Circuit Court for Allegany County
Case No. C-01-CR-21-000764

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 982

September Term, 2023

JAMES LEVI EARLY

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 13, 2024

An Allegany County jury found appellant James Levi Early guilty of sexual abuse of a minor. The circuit court sentenced him to 30 years of imprisonment and suspended all but 25. He appealed.

Early presents the following questions for our review:

I. Did the circuit court err in denying [Early's] motions to exclude evidence of prior bad acts?

II. Did the circuit court err in denying [Early's] motion for a mistrial?

For the following reasons, we affirm the trial court's rulings.

FACTUAL & PROCEDURAL BACKGROUND

In 2004, Early and Barbara P. began a tumultuous relationship that would last for the next ten years. In 2005, Early moved into Barbara P.'s residence in Frostburg. Early did not reside continuously with Barbara P., but he was there three to four times a week.

Barbara P. had two children from a prior relationship, Devin P. and B.P. In 2005, Devin P. was approximately six years of age, and B.P. was approximately four years of age. Over the course of several years, Early and Barbara P. had three children of their own together.

During their time in Frostburg, Barbara P. was unemployed, but when she needed to be away from the home, Early would be the primary caretaker of the children.

In late 2020, B.P., who was then about 19 years of age, told a law enforcement officer that Early had sexually abused her when she was a child. At trial, B.P. testified that Early "started molesting" her when she was in elementary school. The abuse would typically occur when her mother was not at home or when B.P. was alone somewhere

with Early. The abuse included cunnilingus, fellatio, digital contact with her vagina, and vaginal intercourse. The abuse ended when she reached puberty.

Over Early's objection, B.P. testified that Early's relationship with Barbara P. was "abusive a lot of the time." She grew up "watching him put his hands on [her] mom." She recalled an incident, when she was in elementary school, when Early came home "extremely mad," "grab[bed] [her] mom by the throat and [threw] her up against the wall."

B.P. testified that she did not disclose the sexual abuse until 2020 because she was "terrified." She had seen her mother go back to Early on many occasions after Early had severely beaten her. She did not think that her mother would do anything to help her. She was afraid that when her mother went back to Early, things would only get worse for her (B.P.).

Over Early's objection, Barbara P. testified that she and Early had physical fights in front of B.P. when B.P. was between six and 12 years old. As a result of the fights, B.P. "would be upset and would be crying." After the fights, Barbara P. would try to calm B.P.

B.P.'s brother, Devin P., testified, over Early's objection, that Early was "super-aggressive" toward Barbara P. Devin P. witnessed physical fights between Early and Barbara P. B.P. was present during those fights. B.P. would react to the fights by crying. She would appear to be "distraught."

Devin P. testified about an incident that occurred when B.P. was about eight years old. Their mother was out of the house with the three other children. Devin P. and B.P.

were alone with Early. Early grabbed B.P.'s arm and took her to their mother's bedroom. Devin P. had a feeling that something was not right. He got up, went to the bedroom, and opened the door. He saw Early, shirtless, standing behind B.P., who was lying on the bed. Early "immediately slammed [the door] in [Devin P.'s] face and told [him] to go sit the hell down." When Early came out of the bedroom, he hit Devin P. in the head and warned him that if he "ever did it again," he would hit him again. Devin P. told no one about what he had seen because he took Early's threat seriously.

We shall introduce additional facts as they become relevant to the legal issues on appeal.

DISCUSSION

I.

Early argues that the circuit court erred in admitting testimony from B.P., Barbara P., and Devin P. about Early's use of physical force against Barbara P. Early contends that the testimony was inadmissible under Maryland Rule 5-404(b).

Rule 5-404(b) provides in pertinent part as follows:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.[1]

"The primary concern underlying the Rule is a 'fear that jurors will conclude from

[1] Rule 5-413 concerns the admission of other "sexually assaultive behavior" of the defendant.

evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)); *accord Winston v. State*, 235 Md. App. 540, 562 (2018). Rule 5-404(b) is designed to protect persons who committed the "other crimes, wrongs, or acts" from an unfair inference that they are guilty not because of the evidence in the case, but because of a propensity for wrongful conduct. *Hurst v. State*, 400 Md. at 407; *see also Wynn v. State*, 351 Md. 307, 317 (1998) (stating that the "rationale underlying the exclusion of other crimes evidence is that a jury, confronted with evidence that a defendant committed another crime, may utilize improperly the evidence to conclude that the defendant is a 'bad person' and, therefore, should be convicted of the charges for which [the defendant] is on trial"); *Sessoms v. State*, 357 Md. 274, 281 (2000) (stating that Rule 5-404(b) is "designed to ensure that a defendant is tried for the crime for which [the defendant] is on trial and to prevent a conviction based on reputation or propensity to commit crimes, rather than the facts of the present case"); *accord Winston v. State*, 235 Md. App. at 563.

Rule 5-404(b) does, however, recognize several exceptions. Specifically, a court may admit evidence of other crimes, wrongs, or acts "for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident[.]" *Id.*

"Before evidence of prior bad acts or crimes may be admitted, the trial court must engage in a three-step analysis." *Hurst v. State*, 400 Md. at 408 (citing *State v. Faulkner*,

314 Md. 630, 634-35 (1989)). "First, the court must decide whether the evidence falls within an exception to Rule 5-404(b)." *Id.* (citing *State v. Faulkner*, 314 Md. at 634). "Second, the court must decide 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.'" *Id.* (quoting *State v. Faulkner*, 314 Md. at 634). "Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Id.* (citing *State v. Faulkner*, 314 Md. at 635).

An appellate court applies varying standards of review to each of the trial court's three conclusions. The appellate court conducts a de novo review of the first conclusion, that the evidence falls within an exception to Rule 5-404(b), such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. *State v. Faulkner*, 314 Md. at 634. In reviewing the second conclusion, concerning whether there was clear and convincing evidence of the defendant's involvement in the other crimes, wrongs, or acts, the appellate court determines whether the evidence was legally sufficient to support the court's finding. *Id.* at 635. Lastly, in reviewing the third conclusion, concerning the balance between probative value and undue prejudice, the appellate court applies a highly deferential abuse of discretion standard. *Oesby v. State*, 142 Md. App. 144, 167-68 (2002). Under that standard, "[r]eversal should be reserved for those rare and bizarre exercises of discretion that are . . . not only wrong but flagrantly and outrageously so." *Id.* Examining the trial court's ruling in light of these standards, we see no error or abuse of discretion.

Before trial, Early moved in limine to exclude any testimony about his use of physical force against Barbara P. During a pretrial hearing, the State argued that Early's acts of domestic violence had special relevance because they would explain that B.P. did not report the sexual abuse because she was afraid of Early. The court ruled that Early's acts of domestic violence were relevant, but only to the extent that B.P. had personal knowledge of them. The court left the specific contours of the admissible evidence for development at trial. At trial, the court permitted B.P., Barbara P., and Devin P. to testify about incidents of domestic violence that B.P. witnessed and about their effect on B.P.

The court did not err in concluding that the incidents of domestic violence had special relevance to the issue of why B.P. did not immediately report the acts of sexual abuse. In *Merzbacher v. State*, 346 Md. 391, 409 (1997), the Court upheld the admissibility of evidence that the defendant, a former middle-school teacher who was alleged to have sexually abused a student, threatened and intimidated the victim and other students. The evidence served, in part, "to explain and was particularly relevant to why [the victim], either reasonably or unreasonably, waited so long"—two decades—"to reveal her story to the State's Attorney's Office." *Id.*

In reaching its decision, the Court relied on *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), a case in which the Fourth Circuit affirmed a father's conviction for sexually abusing his nine-year-old daughter. The *Powers* court relied on Fed. R. Evid. 404(b), on which Maryland Rule 5-404(b) is largely based, to uphold the admission of evidence that the defendant regularly beat his wife and children and, on one occasion, threatened to burn down the family home. *United States v. Powers*, 59 F.3d at 1464-66.

The court explained:

> Evidence of the beatings of both [the victim] and her family provides a cogent explanation for [the victim]'s failure to report the sexual abuse for almost eighteen months. Thus[,] evidence of the beatings makes it more probable that [the victim] failed to report the sexual abuse not because it never took place, but because of her fear of retribution.

Id. at 1465.

Merzbacher compels the conclusion that Early's acts of domestic violence had special relevance to a recurring issue in cases involving the sexual abuse of children: why the victim did not immediately report the sexual abuse that she claims to have suffered.

Early does not seem to dispute that the evidence of domestic violence had special relevance. Instead, he argues that, at trial, the circuit court did not conduct the second and third steps of the analysis under Rule 5-404(b)—i.e., that the court did not expressly find that Early's acts of domestic violence were established by clear and convincing evidence or that the probative value of that evidence was not substantially outweighed by the danger of undue prejudice.

Although the appellate courts find it useful for a trial court to detail its findings on each step of the three-part analysis under Rule 5-404(b), a trial court is not obligated to make express findings, as long as "the record discloses that it was aware of the governing rule and appreciated the importance of the evidence and its impact on the trial." *Hill v. State*, 134 Md. App. 327, 354 (2000) (citing *Ayers v. State*, 335 Md. 602, 635-36 (1994)); *see also Wilder v. State*, 191 Md. App. 319, 344 (2010). In all cases, including cases involving Rule 5-404(b), we presume that trial judges know the law and correctly apply it. *See Wilder v. State*, 191 Md. App. at 344.

Here, the record discloses that the circuit court was acutely aware of the governing rule and that the court appreciated the importance of the evidence in question and its impact at trial. The court reserved judgment on the admissibility of any evidence of domestic violence until the State presented specific testimony for the court to review. During the testimony of each of the three witnesses who discussed domestic violence—and particularly during the testimony of B.P., the first witness to testify on the subject—the court closely monitored the questions and the answers and considered the parties' arguments at several lengthy bench conferences. The court allowed the witnesses to answer only after it had confined the testimony to evidence, of which they had personal knowledge, of incidents of domestic violence that B.P. had witnessed and of the impact of those incidents on B.P.

In these circumstances, we are satisfied that the court implicitly found that the State had adduced clear and convincing evidence of those incidents and that the probative value of the witnesses' testimony was not substantially outweighed by the danger of unfair prejudice. The court did not err or abuse its discretion in admitting the testimony.

Both at trial and on appeal, Early complained that, before the trial began, the State did not disclose specifically what the witnesses would say about domestic violence. He concedes, however, that the State did not know exactly what the witnesses would say until they took the stand, which, in Early's words, made "previous actual notice impossible."[2] In fact, the State apparently knew no more than Early, who brought the

[2] All three of the witnesses lived in another state, hundreds of miles from Allegany County.

issue before the court through his motion in limine.

Nonetheless, Early asserts that the court was required to "conduct[] a hearing outside of the presence of the jury to properly resolve the issue[.]" He cites *Cross v. State*, 282 Md. 468, 478 n.7 (1978), in which the Court wrote that "[t]he preferred method for submitting any evidence of other crimes to the court during trial would be by way of a proffer to the trial judge[.]" He does not explain how the State could make a proffer if it did not know exactly what the witnesses would say.

In any event, the preferred method is not the exclusive method. A court has broad discretion over the conduct of a trial. *See generally* Md. Rule 5-611(a). The court did not abuse its discretion in proceeding as most courts typically do, by resolving the issue of admissibility on a question-by-question basis rather than demanding a proffer or conducting a hearing outside the presence of the jury to ascertain what the witnesses would say.

II.

In closing argument, Early's counsel attempted to persuade the jury that B.P. had invented a story and that her story kept changing and improving as time progressed. The prosecutor's rebuttal was largely directed toward the charge that B.P. was lying. At the end of the rebuttal closing argument, the prosecutor made the following comment:

> There is no reason, none, to not believe [B.P.] She has done nothing but be honest with you. *To ask you to endure just for a short time, the same thing she lives with on a daily basis*.

(Emphasis added.)

Early's counsel objected. At the bench, Early's counsel explained that the State

was "asking the jurors to put themselves" in B.P.'s place. The court agreed that the State was making a "golden rule" argument, in which a litigant "asks the [jurors] to place themselves in the shoes of the victim[.]" *Lee v. State*, 405 Md. 148, 160 n.6 (2008) (citations omitted).

The prosecutor denied that he had asked the jurors to put themselves in B.P.'s place. He said: "I asked them for a short time to endure the trauma she went through because she was testifying to it," by which he seems to have meant that the experience of testifying was so painful for her that she would not have endured it unless she was telling the truth. He offered to clarify his comments. The court directed him to do so.

When the bench conference ended, the prosecutor said:

> Ladies and gentlemen, let me clarify. *I am not asking you, I am not asking you at all because I can't and I won't, to put yourself in [B.P.]'s position*. That is unfair to you and that is unfair to her and I would never ask you to do that. What I am asking you to do is to understand that as disturbing and uncomfortable and upsetting as it was to hear what [B.P.] had to say, she lives with that on a daily basis. That's what I mean by that. *She is asking you to endure for a short time, the things she lives with daily*. *You don't have to put yourself in her position. I am not asking you to do that and I would never ask you to do that*, what I am asking you to do is to take . . . .

(Emphasis added.)

At that juncture, Early's counsel objected again. The court summoned the attorneys to the bench for another conference. At the bench, Early's counsel asserted that the prosecutor was "going round and round here, saying the same thing." The court seemed to agree. Early's counsel asked for "the instruction." The court asked, "What instruction would you like?," adding that "giving an instruction is just going to highlight" the comment. Early's counsel responded by moving for a mistrial on the ground that the

prosecutor had asked the jurors to put themselves in B.P.'s place.

The prosecutor interjected that he had not asked the jurors to put themselves in B.P.'s place. He stressed that he had told the jurors that he was "not asking" them to put themselves in B.P.'s place and that he "would never" do that. Had he not been interrupted by the objection, he said, he would have told the jurors that he wanted them to understand that what they heard "is something she lives with on a daily basis." He explained:

> The fact is Your Honor, the Defense counsel has made it sound like she came in here and lied and is making all this up generally for her pleasure, and I want to be able to ask them[,] did it seem pleasurable to her[?] Does it really seem like this is something she wanted to do[?]

The court denied the motion for a mistrial, but offered to give a curative instruction. Early's counsel declined the offer of a curative instruction, saying that "it would hurt, more than help." On appeal, Early argues that the circuit court abused its discretion in denying the motion for a mistrial. We perceive no abuse of discretion.

"'A mistrial is no ordinary remedy[.]'" *Winston v. State*, 235 Md. App. 540, 569 (2018) (quoting *Cooley v. State*, 385 Md. 165, 173 (2005)). Rather, it is 'an extreme sanction' to which courts sometimes must resort 'when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice[.]'" *Id.* (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). "[T]he determining factor as to whether a mistrial is necessary is whether the prejudice . . . was so substantial that [the defendant] was deprived of a fair trial." *Id.* at 569-70 (cleaned up).

"'[A] request for a mistrial in a criminal case is addressed to the sound discretion

of the trial court[.]'" *Cooley v. State*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)); *accord Winston v. State*, 235 Md. App. at 570. "[T]he trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm v. State*, 272 Md. at 429; *accord Winston v. State*, 235 Md. App. at 570.

> "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has [a] finger on the pulse of the trial."

Simmons v. State, 436 Md. 202, 212 (2013) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)); *accord Winston v. State*, 235 Md. App. at 570.

An appellate court will not reverse the denial of a mistrial motion absent a clear abuse of discretion (*see Simmons v. State*, 436 Md. at 212; *Browne v. State*, 215 Md. App. 51, 57 (2013)), and certainly will not reverse simply because it might have ruled differently. *See Nash v. State*, 439 Md. 53, 67 (2014) (citations omitted); *accord Winston v. State*, 235 Md. App. at 570. In assessing whether a court abused its discretion in denying a mistrial, an appellate court looks "to whether the trial judge's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Hart*, 449 Md. 246, 264 (2016) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

In evaluating whether the circuit court abused its discretion in denying the motion for a mistrial, we assume, for the sake of argument, that the prosecutor made an improper "golden rule" argument when he "ask[ed]" the jurors "to endure just for a short time, the

same thing [B.P.] lives with on a daily basis." The court, however, sustained Early's objection to that comment and directed the prosecutor to clarify that he was not asking the jurors to place themselves in B.P.'s position.

Complying with the court's direction, the prosecutor twice disclaimed any intention to ask the jurors to place themselves in B.P.'s position. Nonetheless, the prosecutor undercut his disclaimer by telling the jurors that B.P. was "asking" them "to endure for a short time, the things she lives with daily." Early objected again before the prosecutor could complete his thought and clarify (or confuse) the situation any further.

In our judgment, the court did not abuse its discretion in denying the motion for a mistrial. As the court explained in denying Early's motion for a new trial, the prosecutor's statement could be seen as an inartful attempt to persuade the jury that because B.P. was in such obvious distress in reliving her experiences, she could not have been fabricating an elaborate lie, as Early had argued. The prosecutor's statement is nowhere near as egregious as the statements in the cases on which Early relies, such as *Lawson v. State*, 389 Md. 570, 593-604 (2005), in which the prosecutor repeatedly asked the jurors to put themselves in the position of the child-victim's mother, suggested that the defendant had the burden to prove that the child was lying, likened the defendant to a "monster," and predicted that he would sexually abuse other children if he were acquitted.

In this case, the trial judge had his finger on the pulse of the trial. In accordance with the rules limiting the scope of appellate review of the denial of a motion for a mistrial, we defer to the trial judge's considered judgment.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.